82-1188

No. .....

In The

Supreme Court of the United States

October Term, 1982

WOMEN'S SERVICES, P. C., et al.,
Appellees,

vs.

CHARLES THONE, Governor of the State of Nebraska, et al.,
Appellants.

LADIES CENTER, NEBRASKA, INC., et al.,
Appellees,

vs.

CHARLES THONE, Governor of the State of Nebraska, et al.,
Appellants.

WOMEN'S SERVICES, P. C., et al.,
Appellees,

vs.

CHARLES THONE, Governor of the State of Nebraska, et al.,
Appellants.

On Appeal from the United States Court of Appeals for the Eighth Circuit

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED FOR REVIEW

1. Whether state legislation regulating the performance of abortions during the first trimester is in all instances subject to strict scrutiny under a substantive due process analysis.

LIST OF PARTIES

The names of the parties to the action below are set out as follows:

Appellants, Charles Thone, Governor of the State of Nebraska: Paul L. Douglas, Attorney General for the State of Nebraska; Donald L. Knowles, County Atttorney for County of Douglas, State of Nebraska;

Intervenor, Marilyn A. Schneider;

Appellees, Womens Services, P.C., a Nebraska Corporation; William G. Orr, M. D.; Ladies Center, Nebraska, Inc., a corporation; John M. Epp, M. D., Betty Roe, by her next friend, Barbara Gaither; and Elizabeth F.

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OPINIONS BELOW

The original opinion of United States District Court Judge Warren K. Urbom is reported at 483 F. Supp. 1022 and appears as Appendix ("App.") A hereto.

The original opinion of the Eighth Circuit Court of Appeals is reported at 636 F. 2d 206 (8th Cir. 1980) (App. B).

The Order of the U. S. Supreme Court is reported at 452 U. S. 911 (1981) (App. C).

The Order of Remand of the Eighth Circuit entered on July 23, 1981 is unreported (App. E).

The Second Memorandum and Order of Judge Warren K. Urbom issued on May 24, 1982 is unreported (App. F).

The final opinion of the Eighth Circuit Court of Appeals issued October 14, 1982 is unreported (App. G).

JURISDICTION

This is the second appeal to this Court of a civil rights action brought pursuant to 42 U. S. C. § 1983 which challenges the constitutionality of certain abortion control statutes enacted by the State of Nebraska. This appeal is taken from a final order of the Eighth Circuit Court of Appeals which held certain portions of those statutes to be invalid as repugnant to the Fourteenth Amendment of the Constitution of the United States.

The final judgment of the Eighth Circuit Court of Appeals was entered October 14, 1982. Appellants' notice of appeal was filed on November 10, 1982 (App. H).

Jurisdiction is conferred upon this Court pursuant to 28 U. S. C. § 1254 (2).

STATUTORY PROVISIONS

Neb. Rev. Stat. § 28-325, et seq. (Reissue 1979).

The statutes cited above are lengthy; therefore, their pertinent text is set forth in App. E hereto.

STATEMENT OF THE CASE

A. Procedural Overview

This is the second appeal to this Court of three consolidated civil rights actions challenging certain abortion control statutes enacted by the State of Nebraska. At issue are statutes which require: (1) that a woman seeking an abortion must affirm in writing that she has been advised of the reasonably possible medical and mental consequences of abortion, childbirth and pregnancy; (2) a waiting period of forty-eight hours following the execution of an informed consent document; (3) the reporting of prescribed abortions to the Nebraska Department of Health.

After a full hearing, the trial court entered a memorandum and order dated November 9, 1979, in which it held:

(1) That a subpart of the statutory definition of informed consent, Neb. Rev. Stat. § 28-326(8)(a) was an unconstitutional abortion regulation.[1]

(2) That a forty-eight hour waiting period, Neb. Rev. Stat. § 28-327 was an unconstitutional abortion regulation.

(3) That Neb. Rev. Stat. § 28-343, as it pertained to "prescribed abortions" was an unconstitutional abortion regulation.

In a per curiam opinion issued December 8, 1980, the Eighth Circuit Court of Appeals affirmed the trial court's judgment in all respects and based its affirmance "primarily on the basis of the district court's decision." *Women's Services, P.C. v. Thone*, 636 F. 2d 206. The Appeals Court added that because of intervening cases of the United States Supreme Court and "for other reasons" it would comment briefly on each aspect of the decision. Addressing the challenged statutes the Eighth Circuit held "that legislation which directly interferes with a woman's fundamental right to decide to terminate her pregnancy is

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1 Neb. Rev. Stat. § 28-327 prohibits the performance of an abortion in the absence of an "informed consent" which term is defined by Neb. Rev. Stat. § 28-326 (8) (a) and which states in relevant part:

> Informed consent shall mean a written statement, voluntarily entered into by the person upon whom an abortion is to be performed, whereby she specifically consents to such abortion. Such consent shall be deemed to be an informed consent only if it affirmatively appears in the written statement that the person upon whom the abortion is to be performed has been advised (a) of the reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth, . . .

subject to *strict scrutiny* under a substantive due process analysis." Id. at 210.

The original decision of the Eighth Circuit was appealed to the United States Supreme Court and was docketed as Case No. 80-1509.

The United States Supreme Court, on June 8, 1981, vacated the judgment of the Eighth Circuit Court of Appeals and remanded the case "for further consideration in light of *H. L. v. Matheson*, 450 U. S. 398 (1981). *Thone v. Womens Services, P.C.*, 452 U. S. 911 (1981) (App. D). The Eighth Circuit then remanded the case to the district court for reconsideration (App. E).

Following the remand to the district court the Appellees were allowed to amend their petitions to cure any "standing" defects. Thereafter the Appellants did not oppose a finding of unconstitutionality of the Nebraska statute which required parental consultation by a minor under the age of 18, Neb. Rev. Stat. § 28-333 (1979) and the district court again held said statute to be unconstitutional. The appellants *did not* appeal that portion of the district court order to the Eighth Circuit and it is not at issue here.

The district court also reaffirmed the unconstitutionality of three other Nebraska statutes which required, (1) the giving of informed consent, Neb. Rev. Stat. § 28-326(8) and § 28-327 (1979); (2) a 48 hour waiting period, Neb. Rev. Stat. § 28-327 (1979); and (3) reporting of prescribed abortions to the Nebraska Department of Health, Neb. Rev. Stat. § 28-343. See App. C for complete text of the challenged statutes.

Both at the district court and on appeal to the Eighth Circuit the defendants argued that the Order of this court entered on June 8, 1981 (App. D) mandated that

a more lenient standard of review be used in judging the constitutionality of *all the challenged statutes* in light of *H. L. v. Matheson.* The district court simply ignored the plea and addressed only the issue of parental consultation, Neb. Rev. Stat. 28-333, and after reading *H. L. v. Matheson* reaffirmed its prior judgment (App. F). To its credit, the Eighth Circuit directly confronted the issue of whether "the Supreme Court in *H. L. v. Matheson, supra,* set out a new standard of review for statutes which regulate abortions". *Womens Services, P.C. v. Thone,* Case No. 82-1786, *Slip Op.* (8th Cir., 10/14/82) (App. D). The Eighth Circuit, in a per curiam opinion found that *H. L. v. Matheson* did not impose a new standard of review for state abortion statutes and affirmed the district court decision which applied "a strict scrutiny standard". The appellants then filed this appeal (App. H).

The appellants again stress that they have absolutely abandoned any claim of constitutionality of Neb. Rev. Stat. § 28-333 (1979) which required "parental consultation". We seek reversal of the final judgment of the Eighth Circuit Court of Appeals holding Neb. Rev. Stat. § 28-326 (8) and § 28-327 (1979) (informed consent), Neb. Rev. Stat. § 28-327 (1979) (48 hour waiting period), and Neb. Rev. Stat. § 28-343 (the reporting of prescribed abortions) unconstitutional. We argue that the courts below have refused to follow the specific mandate of this court in *Thone v. Womens Services, P.C.,* 452 U. S. 911 (1981).

B. Statement of Facts

Substantial testimony was presented at trial in regard to the manner of medical practice of the appellees' abortion clinics and the medical complications of abor-

tions performed at all stages of pregnancy. Included in this latter subject was expert testimony of Dr. Leslie Iffy, an internationally recognized physician, a specialist in the fields of both obstetrics and gynecology and neonatology, and the author of numerous scholarly articles on the subject of long term medical complications of induced abortions[2] (T1598:5-1602:1).[3] Dr. Iffy gave as his principal expert opinion that one single abortion performed during the first trimester closely doubles the rate of premature births in subsequent pregnancies (T1619:7-11). Dr. Iffy further testified that prematurity is the leading cause of death or physical and mental disability in children (T1622:12-25) and that each subsequent abortion relatively increases the risk of prematurity (T1619:7-11).

Appellants at trial also presented evidence that appellee Womens Services, P.C. engaged in virtually no counseling of its abortion patients (T1033:4-1036:15), that physicians of both of appellees' abortion clinics often never saw the abortion patient until she was on the procedure table, that the clinics were performing abortions on an assembly line basis, and that there was no doctor-patient

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2 Of additional note in regard to Dr. Iffy's qualifications and lack of any personal bias was his testimony which reflected his clinical experience of having performed numerous abortions during his twenty-five year plus medical career and the lack of any impeachment evidence that Dr. Iffy has ever expressed or shared in an opinion that abortion is morally wrong.

3 The transcript of trial testimony (T) is in the custody of the Clerk of the Eighth Circuit Court of Appeals. Appellants have not elected, pursuant to Supreme Court Rule 13, to certify the record to this Court since we do not deem it essential, but we do feel that reference to the record is necessary for a proper understanding of the case and its importance.

relationship established (T252:15-264:25; T1268:11-1273:21).

The evidentiary record below also disclosed that only in the most rare of occasions has a woman ever been provided an abortion by either of appellees' abortion clinics within forty-eight hours of her request for medical treatment. The testimony of abortion clinic personnel proved that for the vast majority of abortion clinic patients there was a delay of from seven to ten days between the time the abortion was first requested and its actual performance (T56:5-60:5; T306:16-25; T1024:9-1025:7).

Further testimony of Dr. Leslie Iffy on the issue of a forty-eight hour delay included his personal observation that during the twenty-five plus years he had performed abortions, he had never found it necessary to perform an abortion within forty-eight hours of the patient first having presented herself (T1726:12-20).

Appellees' expert witness, Dr. Christopher Tietze, an internationally recognized medical statistician, testified that a delay of forty-eight hours during the first trimester would be "clinically unimportant." When asked to define "clinically unimportant," Dr. Tietze stated, "I would draw no conclusion as to whether it was desirable to do it [abortion] earlier or to do it later." (T957:3-6).

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THE QUESTIONS ARE SUBSTANTIAL

ARGUMENT

I.

This appeal raises an important and recurring issue regarding the proper legal standard of review to be used by federal courts in judging the constitutionality of state statutes regulating the performance of abortions.

In the interest of judicial efficiency, we first point out that this appeal is closely related (if not absolutely subject to the control of this court's anticipated decision) to *City of Akron v. Akron Center for Reproductive Health, Inc., et al.*, Case. Nos. 81-746 and 81-1172. These appellants in fact totally endorse the argument made in the brief of the petitioner, City of Akron, found at pages 18-24. It is of further interest to note that the petitioner, City of Akron, relies upon the prior decision of this court in *Thone v. Womens Services*, 452 U. S. 911 (1981).

This appeal involves laws enacted by the State of Nebraska which have, as their primary aim, the protection of the decision making process of women who seek abortions. In affirming the initial holding of the District Court that these statutes were constitutionally defective, the Eighth Circuit held that the statutes directly interfered with "a woman's fundamental right to decide whether to terminate her pregnancy . . .", and were thus, ". . . subject to strict scrutiny under the substantive due process analysis". *Womens Services, P.C., et al. v. C. Thone, et al.*,

636 F. 2d 206 at 210. Appellants challenged this holding in an appeal to the United States Supreme Court and we specifically addressed, as our primary issue on appeal, the conflict among the Circuits regarding the proper standard to be applied to abortion control statutes. The question put to the Supreme Court in our prior appeal was "whether state legislation regulating the performance of abortions during the first trimester is in all instances subject to strict scrutiny under a substantive due process analysis." The answer of the Supreme Court was to remand the case to the District Court for further consideration in light of *H. L. v. Matheson. Thone v. Womens Services,* 412 U. S. 909 (1981).

We therefore believe that the District Court was compelled to look to *H. L. v. Matheson,* supra, and determine the proper standard of review for abortion control legislation. *H. L. v. Matheson,* supra, speaks directly to this question with the following language of Chief Justice Burger:

> The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions. To the contrary, state action encouraging childbirth except in the most urgent circumstances is rationally related to the legitimate governmental objective of protecting potential life.
>
> 450 U. S. 298, 303 (1981).

After 4 plus years of litigation we still have not arrived at any determination of what legal standard of review is applicable to state legislation which attempts to insure that the abortion decision "be made with full knowledge of its nature and consequences", *Planned Parenthood of Central Missouri v. Danforth,* 428 U. S. 52, 67

(1967). The constitutionality of legislation calling for a more detailed informed consent than that found in *Danforth*, and the inclusion of a *waiting period* to insure that the informed consent information be carefully weighed is admittedly dependent upon a standard of review which would require a showing of an "undue burden" on the abortion decision making process. Directly supporting this relaxed standard of review is the following language of this Court:

> In *Planned Parenthood of Central Missouri v. Danforth* we today struck down a statute that created a parental veto. . . . At the same time, however, we held that a requirement of written consent on the part of a pregnant adult is not unconstitutional unless it unduly burdens the right to seek an abortion.
>
> *Bellotti v. Baird*, 428 U. S. 132, 147 (1976).

In similar language in *Maher v. Roe*, 432 U. S. 464, 473 (1977), the Court held:

> Although a state created obstacle need not be absolute to be impermissible, . . . we have held that a requirement for a lawful abortion "is not unconstitutional unless it unduly burdens the right to seek an abortion." (Citations omitted.)

This legal standard of review was adopted by the Sixth Circuit in *Wolfe v. Schroering*, 541 F. 2d 523, 526 (1976), which case involved the challenged constitutionality of a 24 hour waiting period statute enacted by the State of Kentucky. The *Schroering* court clearly identified the legal standard adopted by it in the following language:

> The district court invalidated the waiting period requirement because "it attempts to regulate the abortion procedure during the first trimester during which time the state has no compelling interest and thus

> can pass no regulation affecting this period." *Danforth* (citation omitted) rejected similar reasoning.

Id. at 526.

Those who oppose abortion regulation laws urge the adoption of the legal standard chosen by the Seventh Circuit in *Charles v. Carey*, 627 F. 2d 772 (1980), the Sixth Circuit in *Akron Center for Reproductive Health, Inc. v. City of Akron*, 651 F. 2d 1198 (1981) cert. granted 50 USLW 3934 (May 24, 1982), the Fifth Circuit in *Deerfield Medical Center v. City of Deerfield Beach*, 661 F. 2d 328 (1981) and the Eighth Circuit in the instant action and in *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, 655 F. 2d 848 (1981) cert. granted 50 USLW 3934 (May 24, 1982). They argue that any statues which regulate first trimester abortions, carry criminal penalties, and impose any restrictions to the effectuation of the decision to abort, must be supported by a compelling state interest. *Charles v. Carey*, supra, at 777, 778. The original decision of the trial court in this action specifically addressed this issue:

> Absent an emergency situation, the informed consent and waiting period requirements would stand between the woman's desiring an abortion and obtaining one. This is a direct obstacle to abortion. *Womens Services, P.C. v. Thone*, 483 F. Supp. 1022, 1043 (D. Neb. 1979).

In so holding, the trial court recognized that considerable confusion and conflict existed as to the proper legal standard to be used in light of post-*Roe v. Wade*, decisions, including specifically, *Bellotti v. Baird*, 428 U. S. 132 (1976), which it admitted did possibly indicate "some retreat from the stiff no-interference-during-the-first tri-

mester standard clearly adopted in *Roe v. Wade,* 410 U. S. 164." *Id.,* at 1043. The trial court then summarized its decision to select "the most rigorous standard" in judging the challenged statutes by stating:

> In any event it would take a clearer signal from the Supreme Court than that in *Bellotti v. Baird* to demonstrate a retreat from the strict standard announced in *Roe v. Wade* and its progeny.

483 F. Supp. 1022 at 1043.

Once having adopted "the stiff no-interference-during-the-first-trimester standard" the trial court openly admitted that it would ignore "extensive evidence presented by the appellants on the subjects of (1) safety of first trimester abortions and (2) the lack of any true physician-patient relationship in the appellees' abortion clinics."[4] *Id.* at 1044.

The selection of the "strict scrutiny" standard by the trial court was of course the death knell for the statutes. First, the trial court admitted that it intentionally chose to disregard "extensive evidence" presented by the appellants regarding the long term consequences of first tri-

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4 In explaining its decision to ignore certain evidence presented by plaintiffs below, the court explained:

> I make no findings of fact with respect to the greatest part of this evidence; that is not appropriate, it would seem, until the Supreme Court is ready to overrule *Roe v. Wade* or at least substantially limit it. I only make those findings of fact necessary to appraise this legislation pursuant to current constitutional standards. In this respect, it cannot be overemphasized that the challenged legislation does not differentiate with respect to trimesters of pregnancy. Thus, all of the legislation must be judged according to the most rigorous standard—that reserved for legislation touching upon the first trimester of pregnancy.

mester abortions and the unsavory medical practices[5] of appellees' abortion clinics.[6] More importantly, and on no less than four occasions, the original trial court opinion states that the analysis of the challenged statutes required "the most exacting judicial scrutiny." *Womens Services, Inc. v. Thone, supra,* at 1042-1044, 1050.

Simply stated, the opinions below hold that any abortion regulation which affects the first trimester and carries a criminal penalty creates an "undue burden" because it is a "direct obstacle" to abortion.

We would respecfully submit to this Court that there is considerable confusion and conflict arising from this Court's initial statement in *Roe v. Wade* that: "For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician" (*Roe v. Wade,* 410 U. S. at 164) and language contained in subsequent decisions wherein state or federal laws regulating, directly or indirectly, the abortion decision making process have not been subjected to "strict scrutiny." *See, Bellotti v. Baird,* 428 U. S. 147 (parental notice); *Maher v. Roe,* 432 U. S. at 473 (public funding); *Planned Parenthood of Central Missouri v. Danforth,* 428 U. S. at 77-79 (informed consent); *Planned Parenthood Association v. Fitzpatrick,* 401 F. Supp. 554 (E. D. Pa. 1975), aff'd 428 U. S. 901 (informed consent); *Harris v.*

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5 These practices included for example the absence of any counseling at one clinic and the administration, before counseling and the expression of informed consent, of valium to minors at the other clinic.

6 The Statement of Facts more fully discusses this evidence.

McRae, 65 L. Ed. 2d 784 at 804-5 (public funding) and of course *H. L. v. Matheson*, 450 U. S. 298, 303 (parental notification).

Plenary consideration will provide the opportunity for this Court to clearly identify the appropriate legal standard to be applied in judging the constitutionality of state laws regulating the performance of first trimester abortions and in particular the permissibility of statutes which attempt to enhance the giving of informed consent and provide for a waiting period in which information given to the abortion patient can be carefully considered. Absent such a ruling, there will be continuing conflict in the Circuit Courts and repeated attempts by the states to enact constitutionally permissible legislation.

Having obtained from this Court a judgment vacating and remanding the original judgment of the District Court, appellants were rightfully of the belief that a *clear signal* had been sent which called for a complete reconsideration with the application of a less demanding standard of review. The subsequent opinions of the district court (App. F) and 8th Circuit Court of Appeals (App. G) unequivocably reflect that this Court's reversal has been interpreted as applying only to the parental consultation issue.

A rational application of this Court's order of June 8, 1981 would indicate that a majority did not agree with the holding of the 8th Circuit that these challenged statutes directly interfere with "a woman's fundamental right to decide whether to terminate her pregnancy . . .", and are thus ". . . subject to strict scrutiny under the substantive due process analysis." *Womens Services, P. C. v. Thone*, 636 F. 2d 206 at 210.

CONCLUSION

Over four years ago, the Nebraska Legislature enacted statutes addressing the problem of abortions being performed at "abortion clinics." It sought to insure that patients visiting such clinics were carefully advised of the consequences of electing to have an abortion. The legislature further required a 48 hour waiting period to insure that following receipt of such information, the decision could be made outside the confines of the abortion clinic. The decision of the trial court clearly emphasized that the statutes were unconstitutional because they regulated first trimester abortions. That issue was taken to the United States Supreme Court and a reversal was obtained which strongly pointed to a definite relaxation of the Supreme Court's prior mandate in *Roe v. Wade,* supra, that the states were restricted from regulating first trimester abortions absent a compelling state interest. If a state can withhold funding for first trimester abortions, *Maher v. Roe,* 432 U. S. 464 (1977), and require parental notification of a minor seeking a first trimester abortion, *H. L. v. Matheson,* 450 U. S. 298 (1981), what possible rationale can restrict a state from insuring that those women who seek abortions during the first trimester have relevant medical information given to them and are provided with a reasonable period of time, outside of abortion clinics, to contemplate the abortion.

The impact of the issues raised herein are substantial. Failure to reverse the decision of the Eighth Circuit Court of Appeals will send a clear message to the courts now examining similar legislation and to state legislatures studying yet to be enacted statutes that the

states may not seek to protect women seeking first trimester abortions by attempting to insure that their decision is made knowingly and without undue pressure or influence of abortion profiteers.

Respectfully submitted,

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